

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

|                           |   |                   |
|---------------------------|---|-------------------|
| UNITED STATES OF AMERICA, | ) | 4:03CR3014-1      |
|                           | ) |                   |
| Plaintiff,                | ) | <b>MEMORANDUM</b> |
| vs.                       | ) | <b>AND ORDER</b>  |
|                           | ) |                   |
| HA T. T. NGUYEN,          | ) |                   |
|                           | ) |                   |
| Defendant.                | ) |                   |

This matter is before the court on the defendant's notice of appeal (filing 313) and on the clerk's recent inquiry (filing 314) regarding such filing. The notice of appeal was filed with reference to the court's judgment of May 5, 2005 (filing 312), which denied the defendant's motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255.

Before the defendant's appeal can proceed, a certificate of appealability must issue. See Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

For the reasons set forth in the court's memorandum and order on initial review (filing 311), the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). Even though a certificate of appealability shall not issue, the appeal does appear to be taken in good faith, such that the defendant may continue to proceed in forma pauperis pursuant to Fed. R. App. P. 24(a)(3).

Accordingly,

IT IS ORDERED:

1. That a certificate of appealability shall not issue in this case;
2. That, in response to the clerk's inquiry, the defendant may proceed in forma pauperis on appeal; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

DATED: May 24, 2005.

BY THE COURT:

s/ Richard G. Kopf  
United States District Judge